IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 556.

CITIES SERVICE GAS COMPANY, a Corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI; the CITY OF KANSAS CITY, MISSOURI; STATE CORPORATION COMMISSION OF KANSAS; and CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,
Respondents.

MOTION OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF, AMICUS CURIAE, IN SUPPORT OF THE PETITION OF CITIES SERVICE GAS COMPANY FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI, AND BRIEF, AMICUS CURIAE.

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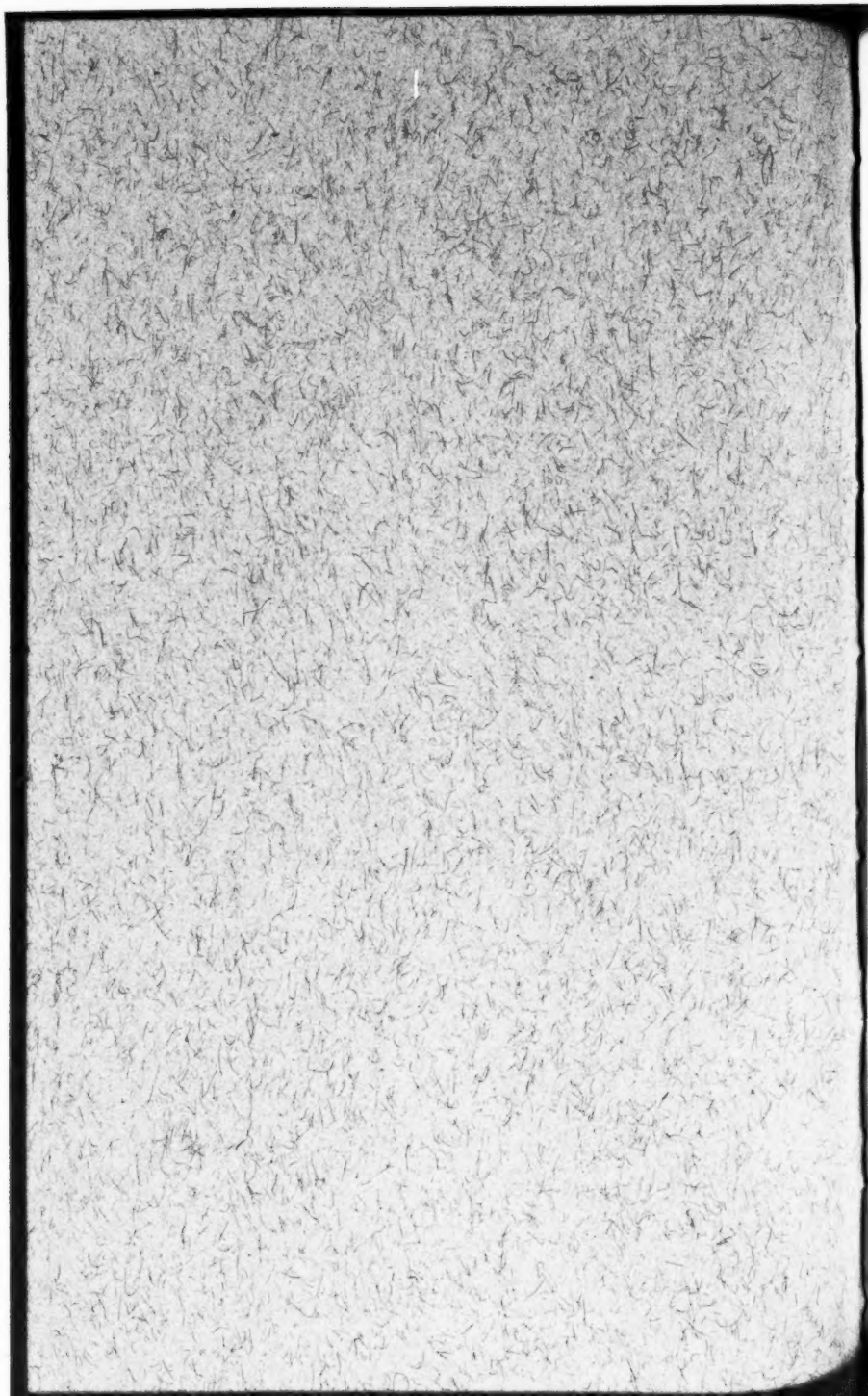

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the Independent Natural Gas Association of America, respectfully moves this Honorable Court for leave to file the accompanying brief in the case as Amicus Curiae. The Solicitor General of the United States, speaking for the Federal Power Commission, Respondent, and Cities Service Gas Company, Petitioner, the parties in legal interest in the record, have consented to the filing of brief by this applicant as Amicus Curiae. The consent of all other parties has been obtained except the City of Kansas City, Missouri, which has refused to accord its consent.

WESLEY E. DISNEY,
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Independent Natural Gas Association of America.

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BRIEF OF THE INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF THE PETITION OF CITIES SERVICE GAS COMPANY FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

This brief is submitted on behalf of the Independent Natural Gas Association of America, a private corporation organized and existing under the laws of the State of Delaware. It has a membership of approximately 1600, located in 23 different states, including all natural gas producing states and most of the natural gas consuming states. Its membership includes producers, royalty owners, transporters (intrastate and interstate), natural gas companies

under the Act, public members and consumer members. It will thus be seen that its membership includes representatives of all groups interested in the production, transportation and use of natural gas.

Since the passage of the Natural Gas Act this Court has exercised its discretion on certiorari by taking jurisdiction and deciding a number of cases arising under the Act.[1]

In these several cases, however, this Court, in most instances, limited its review to certain specific questions, the result being that up to this time the Court has not passed upon some of the most important questions involved in the construction and administration of the Natural Gas Act. The fact that this Court has on so many occasions since the comparative recent passage of the Natural Gas Act taken jurisdiction over questions involving that Act indicates that this Court recognizes the public importance of such questions as justification for certiorari and convinces us that in denying the Petition for Writ of Certiorari by the Cities Service Gas Company in this case the Court has overlooked or not fully comprehended the character and importance of the questions presented.

SUMMARY STATEMENT.

In this case Cities Service Gas Company in its Petition for Writ of Certiorari presented eight separate and distinct questions. By its judgment of November 12, 1946, this

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[1] *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; 62 S. Ct. 736.
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591; 64 S. Ct. 281.
Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U. S. 581; 65 S. Ct. 829; 89 L. Ed. 1206.
Canadian River Gas Co. v. *Federal Power Commission*, 324 U. S. 581; 65 S. Ct. 829; 89 L. Ed. 1206.
Colorado-Wyoming Gas Co. v. *Federal Power Commission*, 324 U. S. 626; 65 S. Ct. 850.
Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 324 U. S. 635; 65 S. Ct. 821.

Court denied the Petition as to all questions presented. We understand that Cities Service Gas Companf has filed or shall file its Petition for Rehearing as to all eight of the questions by it presented in its Petition for Writ. A decision on all eight questions contained in the Petition for Writ is, in our opinion, necessary for a proper determination of the jurisdiction of the Federal Power Commission under the Act and the administration thereof and the conduct of the great and growing natural gas industry and the consuming public.

Without in any way minimizing and still suggesting the importance of all eight questions involved, but leaving the presentation of all but two of the presented points to others on this rehearing proceeding, we will limit our presentation and argument to two only of the eight questions presented in the Petition for Writ; namely, Questions numbered 2 and 3. Briefly stated, these questions involve the following:

> QUESTION No. 2: Regulatory Jurisdiction of the Federal Power Commission over the Production and Gathering of Natural Gas
>
> QUESTION No. 3: Do the Previous Decisions of this Court Involving Cases Under the Natural Gas Act Either Directly or By an Application of the "End Result" Theory Authorize the Commission to Exclude all Evidence of Market Value of Natural Gas Leaseholds and Ground the Rate Base as to Such Leaseholds Solely Upon the Original Cost Thereof?

As to these two questions, the Court of Appeals in its opinion to which this Petition for Writ is directed [2] has upheld a Federal Power Commission rate reduction order, as we read and interpret its opinion, upon the sole ground that it is foreclosed from exercising its own independent judicial function by one or more of the opinions of this Court in the several cases hereinabove referred to pre-

[2] *Cities Service Gas Co.* v. *Federal Power Commission, et al.*, 155 Fed. (2d) 694.

viously decided by this Court.[1] If the Court of Appeals is in error in this conclusion, then we submit that the Petitioner, Cities Service Gas Company, must necesasrily be right in its arguments herein advanced that it has been deprived of the judicial review and protection to which it is entitled under the Constitution and under Section 19(b) of the Act. Again, if the Court of Appeals is incorrect in concluding that it is so foreclosed by this Court's previous opinions and this Court shall allow the opinion and judgment of the Court of Appeals to stand by denial of the Petition for the Writ of Certiorari, a precedent is set for all practical purposes which will control the natural gas industry and its relations with the Government through the Federal Power Commission and with the consuming public. These questions do not involve merely the particular litigant in this case.

We are frank to say that we know of no case in which these important questions are more forcibly and strikingly presented and are more apt for decision by this Court than in this *Cities Service* case. We venture to state that the questions are of such importance and will be presented so often from time to time they must necessarily at some time be decided, and even if consideration of the particular litigant at bar be ignored, the public importance of the questions presented we believe justifies their consideration and determination by this Court at this time.

While arguments in support of the two questions to which this brief is directed can and will no doubt be presented from different viewpoints, it is our purpose, as above stated, to point out that the affirmance by the Court of Appeals of the Commission's rate reduction order in this case is erroneous because grounded upon an erroneous conception of the law, in that, as to these points at least, the affirmance of the Commission's order is entirely based upon the conclusion that the applicable law had been definitely settled by the previous decisions of this Court.

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[1] See cases cited in footnote, page 4 of this brief.

That the Court of Appeals was wrong in this construction of the previous decisions of this Court and consequently the Petitioner, Cities Service Gas Company, has been denied the judicial review to which it is entitled by the Constitution and the Act and therefore the order of the Commission and the affirming judgment of the Court of Appeals should not be permitted to stand without the consideration and determination by this Court, is the scope of the following argument which we will present in as brief a manner as possible.

ARGUMENT.

Question No. 2.

Regulatory Jurisdiction of the Federal Power Commission Over the Production and Gathering of Natural Gas.

This involves the question of the proper interpretation of Section 1(b) of the Act which expressly provides that its provisions "shall not apply * * * to the production or gathering of natural gas." The Commission in this *Cities Service* case, notwithstanding this provision of the Act, avowedly exercised rate-regulatory jurisdiction over the production and gathering properties of the Cities Service Company. The Court of Appeals held that the Commission had such jurisdiction [3] and based this conclusion upon the opinions of this Court in the *Colorado Interstate* and *Canadian River* cases.[1] The Court of Appeals called attention to the several opinions of this Court on this question and concluded: "It is thus clear that under the prevailing view, the Commission did not exceed its jurisdiction by the inclusion of the production and gathering facilities in the rate base for purposes of determining just and reasonable rates for the transportation for resale of natural gas" (155 Fed. (2d) 700).

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[1] See cases cited in footnote, page 4 of this brief.

[3] 155 Fed. (2d), pp. 699-700.

We respectfully submit that there is no prevailing opinion of this Court outstanding at this time holding that the Commission has rate-regulatory jurisdiction over production and gathering. In the *Canadian River* case this Court took jurisdiction on certiorari of that question. Three opinions were written. Five members of this Court, for divergent reasons, were in favor of an affirmance of the judgment of the Court of Appeals and the Commission's order involved in that case, so the judgment of the Court of Appeals affirming the Commission order involved in that case was affirmed by this Court.

Mr. Justice Douglas wrote one opinion in the *Canadian River* case in which Justices Black, Murphy and Rutledge joined. These four Justices held that the Commission does have rate-regulatory jurisdiction over production and gathering.

Mr. Chief Justice Stone wrote a dissenting opinion, joined in by Justices Roberts, Reed and Frankfurter, holding that the Commission did not have such jurisdiction over production and gathering.

Mr. Justice Jackson wrote a special concurring opinion in which he agreed on an affirmance of the judgment of the Court of Appeals, but in his special concurring opinion he likewise held that the Commission did not have rate-regulatory jurisdiction over production and gathering. His affirmance as to this point was based upon the theory that the Commission in that case had not exercised prohibited rate-regulatory jurisdiction over production and gathering.

As we analyze the Canadian River opinions, therefore, this Court has held by five to four that the Commission does not have rate-regulatory jurisdiction over production and gathering. It seems clear to us, therefore, that the Court of Appeals in this *Cities Service* case has grounded its judgment upon an obvious misconception of the ruling of this Court in the *Canadian River* case. The most that possibly could be said of the *Canadian River* case is that the Court divided four to four on this jurisdictional ques-

tion, with Mr. Justice Jackson voting an affirmance on entirely different grounds. This Court has only recently held in the case of *United States* v. *Pink* that "* * * The lack of an agreement by a majority of the court on the principles of law involved prevents it (the decision) from being an authoritative determination for other cases."[4] There was, therefore, we submit, no legal justification for the Court of Appeals in the *Cities Service* case concluding that it was bound by a decisive precedent of this Court on this jurisdictional question. Having based its judgment upon this erroneous concept of the law claimed to have been established by this Court, the judgment of the Court of Appeals should not be permitted to stand in the light of the opinion of this Court in *Connecticut L. & P. Co.* v. *Federal Power Commission*,[5] in which this Court directly held that a Commission order could not stand and must be reversed because it had not proceeded under a correct rule of law.

Question No. 3.

Do the Previous Decisions of This Court Involving Cases Under the Natural Gas Act Either Directly or by An Application of the "End Result" Theory Authorize the Commission to Exclude All Evidence of Market Value of Natural Gas Leaseholds and Ground the Rate Base as to Such Leaseholds Solely Upon the Original Cost Thereof?

The Commission, in its assumption of rate-regulatory jurisdiction over production and gathering facilities of Cities Service Gas Company, excluded all evidence of the fair or market value of thousands of acres of natural gas leaseholds and grounded its rate base, so far as the leaseholds are concerned, entirely upon the original cost thereof. As shown by the brief of Cities Service Gas Company in

[4] *United States* v. *Pink*, 315 U. S. 203; 62 S. Ct. 552.
[5] 324 U. S. 515; 65 S. Ct. 749.

support of its Petition for the Writ, the effect of this was to include a large acreage at no value and most of the remaining acreage at a nominal value.

The Court of Appeals sustained the Commission in this action (155 Fed. (2d), p. 700). The Court of Appeals felt bound to sustain the Commission in this respect because of its interpretation of this Court's opinions in the *Canadian River* and *Panhandle Eastern* cases. In its majority opinion (pp. 701, 702) the Court of Appeals states:

> "* * * In support of certiorari, the Canadian River Gas Company, as the owner of the properties devoted to the integrated enterprise, strenuously complained of the refusal of the Commission to include the producing properties in the rate base at the cash sale price paid by the company first devoting them to public use. That point was taken on certiorari, 323 U. S. 807, 65 S. Ct. 427, 89 L. Ed. 644, and specifically treated on appeal. 324 U. S. at page 604, 65 S. Ct. at page 840, 841, 89 L. Ed. 1206. The majority of the court could not 'say as a matter of law that the Commission erred in including the production properties in the rate base at actual legitimate cost.' 320 U. S. at page 605, 65 S. Ct. at page 841, 89 L. Ed. 1206. But see Mr. Justice Jackson concurring, 320 U. S. at page 610, 65 S. Ct. at page 843, 89 L. Ed. 1206, and dissent of the late Mr. Chief Justice Stone, 320 U. S. at page 616, 65 S. Ct. at page 845, 89 L. Ed. 1206. A like contention was made and rejected in Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U. S. 635, 648, 65 S. Ct. 821, 89 L. Ed. 1241.
>
> In view of these pronouncements, we regard the question no longer a debatable one in this court. * * *"

We again submit that the Court of Appeals has misconstrued the opinion of this Court.

In the *Canadian River* case the Commission did actually receive in evidence and consider both original cost and present fair value of the natural gas leaseholds involved, and then included the leaseholds in the rate base at original cost. In the opinion of Mr. Justice Douglas, joined in

by three other Justices, this Court approved the action of the Commission in this respect upon the ground previously announced in the *Natural Gas Pipeline* and *Hope* cases that the Commission is not bound to use any single formula in determining rates.

In the present *Cities Service* case the Commission excluded all evidence of fair value of the leaseholds and so made it impossible to give consideration to fair value in determining which formula it should use in arriving at the rate base.

We believe no case has been submitted to this Court in which all evidence of fair value was actually excluded by the Commission.

In the *Canadian River* case four members of this Court, in the opinion written by Mr. Chief Justice Stone, held that the Commission did not have rate-regulatory jurisdiction at all over production and gathering, so clearly these four Justices have not approved the inclusion of natural gas leaseholds in a rate base at original cost, or at all.

Mr. Justice Jackson, in his special concurring opinion in the *Canadian River* case, in most strong language, disapproved the inclusion of natural gas leaseholds in a rate base at original cost, and joined in an affirmance of the Commission's order involved in that case only upon the "end result" theory, which theory he also disapproved but felt bound to follow because of previous decisions of this Court.

We again submit, therefore, that as to this question, in so far as the *Canadian River* case is involved, there is no opinion by a majority of this Court holding it proper to reject all evidence of fair value of natural gas leaseholds in arriving at a rate base and grounding the rate base "as a matter of law" entirely upon original cost. In fact, again as we construe the *Canadian River* opinions, a majority of the Court has held to the contrary.

In concluding his discussion of this question in the *Canadian River* case Mr. Justice Douglas said (p. 605, U. S.):

> "Hence, we cannot say as a matter of law that the Commission erred in including the production properties in the rate base at actual legitimate cost. That could be determined only on consideration of the end result of the rate order, a question not here under the limited review granted the case."

It will thus be seen that all that was said in this connection even by Mr. Justice Douglas and his three associates who joined in his opinion, was that it was not erroneous as a matter of law, after considering evidence of fair value, to use the original cost formula in the rate base.

It will also be noted that the reason assigned for this conclusion was "That could be determined only on consideration of the *end result* of the rate order, *a question not here under the limited review granted the case.*" (Italics supplied.)

In the *Canadian River* case the "end result" of the rate reduction order therein involved, including the inclusion of the leaseholds there involved at original cost, was tendered to this Court as a point for consideration on certiorari, but this Court refused to grant certiorari on the "end result" point, as indicated by Mr. Justice Douglas. It will thus be seen that this Court did not in the *Canadian River* case (and has not in any other case to our knowledge) decide or consider the propriety or legality of excluding all evidence of value of leaseholds and including the leaseholds in the rate base at original cost when viewed in the light of the "end result."

When the Court of Appeals, therefore, in the *Cities Service* case grounded its affirmance of the Commission's order upon the premise that the right of the Commission to include natural gas leaseholds in a rate base at original cost, even going to the extent of excluding all evidence of fair value, was no longer a debatable question, and in reliance thereon cited the *Canadian* case, we submit the Court committed grievous error. As we have pointed out above,

this Court, in the *Canadian* case, did not so decide. Viewing the three separate opinions of this Court in the *Canadian* case, it would seem that this Court has decided just to the contrary. Four Justices directly held that the Commission had no rate-regulatory jurisdiction at all over production and gathering. Four Justices held that it did have such jurisdiction and that it had properly exercised that jurisdiction if the "end result" of such inclusion be ignored, which the Court proceeded to ignore because it had not granted certiorari on that particular issue. Then Mr. Justice Jackson, while reluctantly affirming the Commission's opinion and the affirmance of the Court of Appeals thereof upon the "end result" theory because he felt bound to do so until a majority of the Court should change the "end result" theory as announced in the *Hope* case, affirmed the Commission's order on the "end result" theory.

The theory of "end result" or "impact of the rate order" is the predominating principle which this Court promulgated and is applying to these natural gas cases. The Court expressly refused to grant certiorari on this "end result" or "rate impact" question when tendered to it in the *Canadian* case. It has not considered or decided the "end result" question in any case when applied to the inclusion of natural gas leaseholds in a rate base at original cost. The application of this "end result" theory to this question is obviously a most important question. The effect of the inclusion of natural gas leaseholds at zero value or nominal value and the allowance of a rate of return upon that zero value or nominal value as applied to the Cities Service situation is most forcibly pointed out in the brief of Cities Service Gas Company supporting its Petition for the Writ.

Mr. Justice Jackson, in his special concurring opinion in the *Canadian River* case, reiterated the views he had expressed in the *Hope* case that the entire rate-base method

should be rejected in pricing natural gas. He referred to this method as producing "delirious" results and "capricious" results. He called the method a "fantastic" method. He felt bound, however, by the "end result" theory announced by a majority of the Court in its previous cases, stating: "I think, however, that the majority which promulgated that decision (*Hope*) should be permitted to continue to spell out its application to specific problems until we see where it leads."

But this Court in this *Cities Service* case has refused so far to grant certiorari on this "end result" or any other question for the purpose of considering and determining where its application does lead as applied to the Cities Service situation.

We suggest that if the "end result" or "rate impact" theory is to continue to be the controlling applicable principle, then this Court should not continue to refuse to grant certiorari on that question as it did in the *Canadian* case.

The Court of Appeals also cited the *Panhandle Eastern* case [1] in support of its conclusion that under the decisions of this Court the right to include natural gas leaseholds in a rate base at original cost and the right to exclude all evidence of fair value was no longer a debatable question.

In this again we submit the Court of Appeals is in error.

The affirming judgment of this Court in the *Panhandle Eastern* case, as in the *Canadian River* case, was by a divided court. The Panhandle Eastern, in its brief before this Court, raised the question of jurisdiction of the Commission over production and gathering and the question of inclusion of natural gas leaseholds in the rate base at original cost, and there is some discussion of this question in the opinion of Mr. Justice Douglas (324 U. S., pp. 648-649). However, this discussion, in substance, merely refers to the opinion of Mr. Justice Douglas in the *Canadian River* case, and then concludes with the statement that in any event Panhandle Eastern was barred from raising these questions

in this Court because it had not raised them in its application for rehearing before the Commission. Clearly, therefore, the Panhandle Eastern decision, even without considering the dissenting opinion of Mr. Justice Stone and Justices Roberts, Reed and Frankfurter, establishes no prevailing rule of this Court that the Commission has rate-regulatory jurisdiction over production and gathering, or, even assuming such rate-regulatory jurisdiction, that it is proper, with or without applying the "end result" doctrine, to include natural gas leaseholds in the rate base at original cost or to exclude all evidence or consideration of fair or market value of the leaseholds in determining what formula should be used in arriving at the rate base.

We have again pointed out that the Court of Appeals on this question has grounded its affirmance of the Commission's rate reduction order upon an erroneous theory of law and upon a misapplication of the decisions of this Court. This being so, then under the rule announced by this Court in *Connecticut L. & P. Co.* v. *Federal Power Commission*,[5] the affirming judgment of the Court of Appeals is necessarily erroneous.

CONCLUSION.

While the granting of certiorari is a matter of judicial discretion, we respectfully submit that in view of the public importance of the questions presented and the special important reasons for certiorari in connection therewith hereinabove pointed out, and the fact that Federal questions of substance are presented which have not heretofore been determined by this Court but have been decided by the Court of Appeals in a way (not merely probably) but clearly not in accord with the applicable decisions of this Court, the discretion of this Court under its Rules should be exer-

[5] 324 U. S. 515; 65 S. Ct. 749.

cised in favor of granting the Petition for the Writ, at least as to the questions above outlined.

Respectfully submitted,

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